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CYNTHIA KELLEY, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN
JERRED SETH KELLEY AND
CINDY LYNN KELLEY
PETITIONERS

versus

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for
Petitioners-Applicants

OF COUNSEL:
HEISLER & WYSOCKI

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER 1

IS THE FIFTH CIRCUIT'S AFFIRMING OF SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY CASE (a) EMBLEMATIC OF THE CONFUSION THAT HAS ARISEN IN THE APPLICATION OF THE *CATRETT-ANDERSON-MATSUSHITA* TRILOGY, OR (b) A CLEAR DEPARTURE FROM ACCEPTED STANDARDS REGARDING SUMMARY JUDGMENTS?

QUESTION NUMBER 2

DID THE FIFTH CIRCUIT MISAPPLY LOUISIANA PRODUCTS LIABILITY LAW IN THIS DIVERSITY CASE BY SUMMARILY RULING ON AN "OPEN AND OBVIOUS DANGER" DEFENSE WHICH IS NO LONGER RECOGNIZED IN LOUISIANA OR IN THE VAST MAJORITY OF OTHER JURISDICTIONS?

QUESTION NUMBER 3

IS THE FIFTH CIRCUIT DECISION IN THE CASE AT BAR INCONSISTENT WITH PRIOR DECISIONS OF NOT ONLY THE FIFTH, BUT OTHER CIRCUITS, WHICH HAVE ESTABLISHED A RULE AGAINST (a) GRANTING SUMMARY JUDGMENT IN PRODUCTS LIABILITY CASES AND (b) GRANTING SUMMARY JUDGMENT WHERE THE ISSUE OF "STATE OF MIND" IS A KEY ELEMENT OF THE DEFENSE ALLEGED?

QUESTIONS PRESENTED FOR REVIEW (continued)

QUESTION NUMBER 4

DID THE FIFTH CIRCUIT PROPERLY GRANT SUMMARY JUDGMENT ON GROUNDS NOT RAISED BY THE MOVER'S MOTION?

QUESTION NUMBER 5

IS THE LETHALITY OF SCREW-TYPE AUGERS A MATTER OF NATIONAL CONCERN SO AS TO WARRANT CONSIDERATION OF THIS CASE BY THE SUPREME COURT?

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STATEMENT OF JURISDICTION

Petitioner[1] seeks review by way of a Petition for Writ of Certiorari to a decision rendered by the United States Court of Appeal for the Fifth Circuit on June 15, 1993, rehearing denied July 29, 1993.

Jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C. § 1254(1) and Rules 10 through 16 of the Rules of the Supreme Court of the United States.

STATUTES AND RULES APPLICABLE TO THIS CASE

The following statutes and local rules of the United States District Court for the Eastern District of Louisiana are applicable to this case:

Local Rule 2.09 **Motions for Summary Judgment.** Every motion for summary judgment shall be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

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[1] Petitioner is Cynthia Ann Kelley, individually and on Behalf of her Minor Children, Jerred Seth Kelley and Cindy Lynn Kelley. Respondent is Industrial Refrigerated Systems, Inc., wholly-owned by David and Linda McGowan and insured by Truck Insurance Exchange.

Rule 56(c), Federal Rules of Civil Procedure: **Motions and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

On July 5, 1987, Jack Kelley was mangled to death by a screw auger at an ice plant in Golden Meadow, Louisiana (Appendix K). On July 1, 1988, Cynthia Kelley filed the instant suit against Industrial Refrigerated Systems, Inc., the seller of the ice plant. On March 17, 1991, the District Court GRANTED plaintiff's motion to strike defenses relating to "victim fault," in accordance with the Louisiana Supreme Court's decision in *Bell v. Jet Wheel Blast,* 462 So.2d 166 (1985).

A jury trial commenced October 7, resulting in a verdict in favor of Industrial as to both manufacturer and seller liability. On plaintiff's motion, a new trial was granted (Appendix E). On April 10, 1992, Industrial filed a motion for Summary Judgment asserting, pursuant to

Local Rule 2.09, that it was not the manufacturer but only the seller of the ice storage bin. *No statement was made regarding the "open and obvious danger" defense as an uncontested fact.* The motion was set for hearing April 29, 1992. Counsel for plaintiff was out of town during the week of April 13 and did not discover the motion until late Tuesday, April 21. Counsel for plaintiff contacted mover's counsel to obtain agreement to an extension, which was given late Wednesday, April 22, 1992 and counsel would have filed the unopposed motion for additional time on Thursday morning but for the murder of Jack Bartlett, a close friend and neighbor, on Wednesday night, April 22, 1992. Unbeknownst to plaintiff's counsel, however, the Court had already granted Industrial's motion as "unopposed" on Wednesday morning, April 22, 1992, and had already entered Judgment of dismissal. Counsel for plaintiff was apprised of the court's action Friday morning when he called the Court's law clerk to confirm the next available date for hearing motions. (See Affidavit, Appendix H at A-77).

A specific response addressing the merits of the motion, and a Motion for Reconsideration were filed April 28, 1992. On May 25, 1992, the Court DENIED plaintiff's motion for Reconsideration, allegedly ruling on the "merits" of the motion. Notice of Appeal was filed on May 28, 1992. The Fifth Circuit Court of Appeals AFFIRMED on June 15, 1993. Plaintiff's separate motions for rehearing and for en banc consideration were DENIED on July 29, 1993.

The jurisdiction of the Court of Appeals in the first instance was based on Title 28 U.S.C. § 1291.

B. Statement of Facts.

The Demere family, which owned property in Leeville, Louisiana, along Bayou Lafourche, decided in the summer of 1986 to purchase an ice plant to serve fishing boats. On January 5, 1987, Delton Demere received a visit from representatives of Industrial Refrigerated Systems, Inc., which held itself out to be "Refrigeration Specialists." The indication was that Industrial would supply a *complete* ice plant, a "turnkey" operation, and an agreement was reached whereby Industrial would sell Delton Demere a complete ice plant for a total price of $259,716.

The component parts were all selected by Industrial and included an automatic delivery system with a "screw-type auger" intended to move the ice to the center of the silo, where it would drop through an opening onto a conveyor belt. The auger was modified to add "teeth" to help the operation. The Demeres had no knowledge regarding any of the component parts or the manner in which they would be assembled.

The plan was to have the plant ready for the shrimping season, in late April or early May. Sometime in late May, the plant was ready to be tested. A pre-start meeting was held at which Industrial representatives Lawrence Olinde and David McGowan were present. During that meeting, a start-up demonstration was held wherein David Easley, a long-time cohort of McGowan and Olinde, threw a metal shovel into the auger, which literally "ate" the shovel. The mutilation of the shovel by the auger was witnessed by McGowan and Olinde long before Jack Kelley was hired. At the time the auger ate the shovel, certain

warning stickers were supposed to have been placed along the bin, near the access doors, *but were not used.* These warning stickers, long available in the industry,[2] were specifically designed to warn potential users of the dangers inherent in the auger. (Appendix J)

After the initial start-up, the plant continuously had problems, attributable to the fact that it was improperly insulated and the ice would "clump up" or "freeze up."[3] Despite various attempts, the problem prevailed, and the plant never functioned in the manner that Industrial had promised on January 5, 1987.

During the time the plant was being assembled, Jack Kelley was working for Demeres' Seafood, Inc. While at the seafood company, Jack Kelley did not have any duties or responsibilities regarding running the ice plant. Steve Fillimich was in charge and Jack Kelley received no train-

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[2] See, J.B. Sevart, P.E. *Reducing Risk of Bottom Unloaders by Control System Design*, presented at the 1985 Mid-Central meeting of the American Society of Agricultural Engineers. This treatise was presented to the District Court as part of plaintiff's "Jet-Wheel Doctrine" Motion, which resulted in the court granting the motion, presumably eliminating "victim-fault".

[3] *Fillimich*, pp. 35 and 36, Excerpt 26; *Wayland Demere*, p. 107, Excerpt 28; *Dalton Demere*, p. 90, Excerpt 27:

A. Somebody had to get in there and stop the ice, or chop the ice with a shovel to keep it from just pushing around freely.
Q. And would somebody have had to get in there while the auger was on?
A. Yes, sir, to get any ice.

(References are to "excerpts" filed with the Court of Appeals)

whatsoever.[4]

On July 5, 1987, Steve Fillimich was doing what he had to do to obtain ice after any period of non-use:[5] chopping the frozen ice inside the auger so that it would feed down to the conveyor belts. Fillimich was not the only one who had gone inside the bin to break up ice. When he couldn't, his son had done so. Steve Dufrene had also entered the bin to break up ice. And while Fillimich testified that he "thought" Jack Kelley had done so once before, the evidence regarding Jack Kelley's prior experience was sparse and inconclusive.[6]

On the morning of July 5, 1987, Fillimich turned on the auger, entered the bin and began breaking up the ice. When Jack Kelley arrived, Fillimich gave Kelley the shovel and switched places while he (Fillimich) went outside to feed the ice into a truck.[7] While Fillimich handled the hose, the auger caught Jack Kelley, denuded him in the process,[8] and mangled him to death.—

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[4] *Damas Demere*, p.185, Testimony, October 8, 1991:

> Q. Okay. so Jack Kelley didn't have — didn't have — to operate the machinery at all; is that right?
>
> A. No, basically he just had the hose onto the truck and there was someone at the iceplant who would basically start the delivery process.

[5] The 4th of July weekend interrupted production. Fillimich testified that if the ice stayed two or three days, "you couldn't do nothing with it." *Fillimich*, p. 35, Excerpt 26.

[6] *Fillimich*, p. 36, Excerpt 26.

[7] *Fillimich*, p. 37, Excerpt 26.

[8] Appendix K shows that Jack Kelley was naked. J.B. Sevart, plaintiff's expert, explained that once the auger catches its victim, it will rip away the clothing. (Excerpt 2, 000992 example # 3).

SUMMARY OF ARGUMENT

This case presents several reasons for Supreme Court review. First, the District Court *and* the Court of Appeals have both misappplied the law on summary judgment standards, emblematic of the confusion that has arisen in all circuits in applying the teaching of the three closely-divided Supreme Court decisions, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (5-4 decision); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (no majority decision); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (6-3 decision with Justices Brennan and Rehnquist authoring separate dissents). While the Court has changed slightly in the seven years since the last decision of the "trilogy" was issued, the confusion, and arguably the misunderstanding, of these cases in the circuits has not subsided, and this area of law should be revisited by the Court. Alternatively, the Court of Appeals so egregiously departed from accepted standards regarding summary judgments that this Court should grant certiorari. The tendency toward "trial by affidavit" is growing in the Fifth Circuit and concern over the misunderstanding of the *Cartett-Anderson-Matsushita* trilogy is widespread. See, *e.g. A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgments, Directed Verdicts and the Adjudication Process*, 49 Ohio State Law Journal 95 (1988).

Where such questions are important and recurring, the Supreme Court should grant certiorari to resolve them. *Glus v. Brooklyn Eastern Dist. Terminal*, 79 S.Ct. 760, 359 U.S. 231, 3 L.Ed.2d 770.(1959)

Secondly, the Fifth Circuit in this case did not pro-

perly apply clearly-enunciated Louisiana products liability law. While Louisiana once applied the "open and obvious danger" defense to products liability claims, in recent years, both the Louisiana Supreme Court[9] and the Courts of Appeal[10] have adopted a risk utility analysis in both premises and products liability claims. In this area of law, Louisiana joins virtually every other jurisdiction in the United States.[11] Therefore, defendants cannot claim that the Fifth Circuit anticipated a trend in Louisiana law. On the contrary, the Fifth Circuit's decision in Kelley regresses from the direction the Louisiana courts have taken.[12]

Under our federalist system, a federal court cannot substitute its judgment on state law for that of the state on substantive matters. Nor can it apply rejected law from a sister state.

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[9] *Oster v. Department of Transp. & Dev.*, 582 So. 2d 1285, 1289 (La. 1991).

[10] *Putman v. Gulf States Utils.* 588 So. 2d 1223, 1229 (La. Ct. App. 1991).

[11] The Court of Appeals relied on two *Mississippi* cases: *Melton v. Deere & Co.*, 887 F.2d 1241, 1244 (5th Cir.1989) and *Gray v. Manitowoc Co.*, 771 F.2d 866, 871 (5th Cir. 1985). On March 25, 1993, however, the Mississippi Supreme Court issued its opinion in *Sperry-New Holland v. Prestage*, 617 So.2d 248, declaring that Mississippi has adopted the "risk utility" analysis since 1987.

In obedience to the Mississippi Supreme Court, the Fifth Circuit REVERSED its prior rulings on two pending "open and obvious danger" cases from Mississippi. See, *Satcher v. Honda*, 993 F.2d 56 (5th Cir. 1993).

It is difficult to understand why this panel decided against Kelley on June 15, 1993 when another panel decided the opposite on May 28, 1993.

[12] Not only did the court fail to discuss *Oster* and *Putman*, it relied on, in its own words, "the only case actually decided on the issue of the obviousness of the danger," *Kelley*, at 1415 n.11 *and that case was reversed by the Supreme Court*, 558 So. 2d 1117 (La. 1990).

Thirdly, even if the Court had applied the correct law, it still should have reversed the District Court based on the federal standard for review of summary judgments. The decision in this case is inconsistent with Fifth Circuit precedent *and* precedent in other circuits against granting summary judgment in products liability cases, as well as precedent against granting summary judgment where the issue of "state of mind" is a key element.

Fourthly, Industrial defended on the ground that it "...was *never* aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley." *Id.* at 1415. Thus, the court resolved two *inconsistent* propositions in favor of the defendant: (a) that Industrial's president was unaware of any dangerous condition, and (b) that a recently hired[13] employee recognized as "obvious" the extreme *extent* of the danger from this auger. Because the affidavit filed by McGowan disclaimed knowledge of the danger, the "open and obvious" defense *was not included in the Statement of Uncontested Facts initially filed by Industrial.* The court grievously erred in affirming summary judgment.

Finally, the lethality of screw-type augers is not a matter limited to south Louisiana bayous. As revealed by documents submitted to the Court, unsuspecting workers are killed and maimed by these type of augers throughout our nation. *Application of Interlocks, Deadman Controls and Emergency Stop Devices as a Design Strategy to Reduce Risk Associated with Agricultural Machinery,* J.B. Sevart, P.E., 1982 Presentation at the 1982 Mid-Central

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[13] Kelley had only been employed at the ice plant for a short period prior to his fatal accident, Damas Demere testimony, p. 175.

Meeting of American Society of Agricultural Engineers, making reference to agriculture as "...the most dangerous occupation in the United States...";[14] *Reducing Risk of Bottom Unloaders by Control Design Systems,* J.B. Sevart, P.E., 1985 Presentation to the Mid-Central Meeting of the American Society of Agricultural Engineers.

The Supreme Court has often granted certiorari for reasons involving "...the protection of the public health..." *Flemming v. Florida Citrus Exchange,* 1958, 79 S.Ct. 160, 358 U.S. 153, 3 L.Ed. 2d 188. Part of the resolution of our health crisis should include the elimination of accidents. The Court of Appeal decision in Kelley actually creates a negative incentive to manufacturers:

Make the danger obvious and thereby avoid liability!

ARGUMENT AND LAW

QUESTION NUMBER 1

IS THE FIFTH CIRCUIT'S AFFIRMING OF SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY CASE (a) EMBLEMATIC OF THE CONFUSION THAT HAS ARISEN IN THE APPLICATION OF THE *CATRETT-ANDERSON-MATSUSHITA* TRILOGY, OR (b) A CLEAR DEPARTURE FROM ACCEPTED STANDARDS REGARDING SUMMARY JUDGMENTS?

Both courts and commentators have remarked that

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[14] This statistic is taken from "Accident Facts" 1981 Edition, *National Safety Council.*

the *Catrett-Anderson-Matsushita* trilogy has left the circuits in some confusion about the burden-shifting analysis applicable to summary judgment motions. *E.g., Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607 (11th Cir. 1991) ("Of the three, *Celotex* is the most notable, not because it significantly changed summary judgment law, but because it is so commonly misunderstood and misapplied."); Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 Dick. L. Rev. 25, 26 (1989) ("Several years have passed since the Supreme Court announced its liberal standards for summary judgment. During that time, lower courts have continued their struggle to apply the proper summary judgment standards to the factual situations before them."); James V. Chin, *the Eleventh Circut Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009, 1018-19 (1992) ("Although commonly misinterpreted, the Supreme Court's decision in *Celotex* requires the moving party first to meet its initial burden of showing that no factual issues warranting a trial exist before the non-moving party must produce evidence in opposition to the motion.") (footnotes omitted).

Nowhere is the burden-shifting standard for summary judgment more inconsistently applied than in the Fifth Circuit, especially in regard to diversity issues where state law controls disposition of the underlying claim—including burden of proof—while federal law controls the procedures for summary judgment. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Hanna v. Plumer*, 380 U.S. 460, 470-473 (1965). The result has been a series of arbitrary Fifth Circuit decisions in the products liability area, some affirming summary judgment based on the non-

movant's failure to meet the burden of proof, *e. g., Russ v. International Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1675 (1992); *Kelley*, 992 F.2d at 1413, while others find that "[s]ummary judgment is rarely appropriate in negligence and products liability cases, even if the material facts are not in dispute," *Little v. Liquid Air Corp.*, 952 F.2d 841, 847 (5th Cir. 1992); *Question No. 3, infra*.

The distinguishing factor appears to be how the Fifth Circuit has approached the *Celotex* burden-shifting analysis. *Celotex* is properly read as shifting the burden of *production* only where the nonmovant clearly bears the burden of proof at trial;

> "*Celotex* simply holds that under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial."

Clark, 929 F.2d at 608. *See also* Chin, *supra*, 26 Ga. L. Rev. at 1019 ("*Celotex* merely provides another way to meet the initial summary judgment burden in cases where the non-moving party has the burden of proof at trial.") (footnote omitted).

This Court decided *Anderson* on the same day the *Celotex* opinion was issued, and held that the District Court could consider the quality and quantity of proof required of the claimant to prove his or her case. *Anderson*

was a libel decision, and the claimant needed clear and convincing proof to prevail. However, the decision in *Anderson* cautions courts *not* to weigh conflicting evidence, but instead to preserve evidentiary matters for the jury:

> "Lest trial courts believe they have free reign to make quality and quantity determinations of the evidence, the court adopted language to create some pause. For example, the Court stated that evidence may be 'so one-sided that a party must prevail as a matter of law,' but the judge 'must ask himself not whether he thinks the evidence unmistakably favors one side or the other.' The Court also noted that the trial judge may consider the insufficient caliber or quantity of evidence, but may not usurp jury functions, including '[c]redibility determinations, weighting the evidence, and the drawing of legitimate inferences from the facts.' "

Weakland, *supra*, 94 Dick. L. Rev. at 39 (quoting *Anderson*, 477 U.S. at 252, 254, 255) (footnotes omitted).

The Fifth Circuit's approach in the case *sub judice* did not follow the customary instructions in *Anderson* but instead adopted a more simplistic approach to the burden of "proof" at summary judgment:

> As the moving party, Industrial bears the initial burden of establishing that there are no genuine issues of material fact. Industrial must sustain this burden by informing the court of the basis for its motion, and by identifying portions of the record which reveal that there are no genuine issues for trial. Once such a showing is made,

> however, the burden shifts to Kelley to set out specific facts in the record showing that a genuine issue exists."

Kelley, 992 F.2d at 1413 (citations omitted). In fact, under Louisiana law, Kelley does not have the burden of proving that the auger was *not* an open and obvious danger, but only that the product was unreasonably dangerous and that, on balance, the utility of warning and the risks of the product created a duty to warn. *Putman*, 588 So. 2d at 1229. Moreover, Kelley's motion and single affidavit did *not* identify any "...portions of the record" to support the motion.

Additionally, the "open and obvious danger" rule — abrogated in Louisiana — requires at least a two-step process, and the defendant bears the burden of production on one step of that process. The claimant first shows that the product is dangerous; the defendant then argues that the danger is obvious. Most often the "obvious danger" rule is referred to as an affirmative *defense*. Here, Defendant never truly raised the "open and obvious danger" rule in its summary judgment motion; instead the court raised it *sua sponte*.[15] This analysis placed a burden at Plaintiff's feet which she did not have under state law, and which Defendant's summary judgment itself did not raise.[16]

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[15] This appears to be a practice unique to the Fifth Circuit, one which utterly confounds the *Celotex* burden-shifting analysis, as noted by Senior Circuit Judge Roney in his dissent to *Russ:* "Raising this argument at this juncture suggests a misunderstanding of the proper placement of burdens in a summary judgment proceeding. *The opposing party has no obligation to produce evidence concerning an argument that has not been raised.*" *Russ*, 943 F.2d at 594 (Roney, S. Cir. J., dissenting).

[16] Moreover, the Fifth Circuit did not follow the admonition of the Court in *Anderson* against weighing the evidence, as more fully discussed *infra*, Question Number 3.

Finally, recent decisions of the Louisiana Supreme Court reject summary judgment in products liability cases, including the only "duty to warn" case cited by the Fifth Circuit in *Kelley*. The Fifth Circuit relied on *Hopper v. Crown*, in which the Louisiana Court of Appeals held that the seller had no duty to warn of open and obvious dangers, and that if the design was so apparent that the seller should have known it, "then it should have been apparent to the plaintiff as well . . . ." 555 So. 2d at 49. The Louisiana Supreme Court reversed without an opinion, which reverses the entire case.[17] However one Justice concurred with reasons worth setting forth verbatim:

> When a product is unreasonably dangerous in normal use and the seller knew or should have known of the defect, the seller has a duty to warn of the defect.
>
> "Whether the lack of a door or a restraining device rendered the forklift unreasonably dangerous in normal use is a contested issue of *fact and law to be decided at trial.* If it is assumed for purposes of the summary judgment in this case that the product was unreasonably dangerous, the seller might still prevail if the defect was obvious to the ordinary user. However, an ordinary user *may not generally realize the dangerous nature* of the product deficiency at issue in this case, and the seller may have the duty to warn, depending upon the seller's knowledge of the defect. Because the seller's motion did not establish that it neither

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[17] The Fifth Circuit incorrectly refers to the reversal as "rev'd on other grounds." *Kelley*, 992 F.2d at 1413.

> knew or should have known of the defect (proof of which will not take place until trial), summary judgment was inappropriate."

558 So. 2d at 1117 (Lemon, J., concurring) (footnotes omitted). *See also Tillman v. Johnson*, 612 So. 2d 70, 70 (La. 1993) (reversing entry of summary judgment for defendant because "the filings in this case indicate that there is a genuine dispute as to whether the lead-based paint on the defendants' respective properties presented an unreasonable risk of harm to the petitioner's minor child for purposes of strict liability under La. Civ. Code art. 2317. This is a disputed issue of mixed fact and law or policy *that is peculiarly a question for the jury* or trier of the facts.")

The Fifth Circuit misapplied both the teaching of *Celotex-Anderson-Matsushita* and underlying Louisiana law in awarding summary judgment. This decision constitutes a clear departure from accepted standards or a misunderstanding of the Supreme Court's teaching. In either event, certiorari should be granted.

QUESTION NUMBER 2

DID THE FIFTH CIRCUIT MISAPPLY LOUISIANA PRODUCTS LIABILITY LAW IN THIS DIVERSITY CASE BY SUMMARILY RULING ON AN "OPEN AND OBVIOUS DANGER" DEFENSE WHICH IS NO LONGER RFECOGNIZED IN LOUISIANA OR IN THE VAST MAJORITY OF OTHER JURISDICTIONS?

Under Louisiana law a seller has a duty to warn of

the unreasonably dangerous properties of any product he or she sells. This duty is the same as the manufacturer's duty in all respects except that the seller is not presumed to have knowledge of any defects, nor is the seller required to inspect the product prior to sale to determine the existence of any defects. *Nelton v. Astro-Lounger Mfg. Co.*, 542 So. 2d 128, 131 (La. Ct. App. 1989); *Martin v. Henderson*, 505 So. 2d 192, 195 (La. Ct. App. 1987). Whether a duty to warn exists, and if so, what warning is adequate, is interwoven with the risk-utility analysis. In *Putman*, the court applied a straightforward risk-utility analysis to determine the existence and breadth of that duty: "When determining the existence or scope of a duty, a court 'should consider a broad range of social, economic, and moral factors including the cost to the defendant of avoiding the risk and the social utility of the plaintiff's conduct at the time of the accident.' " 588 So. 2d at 1229 (quoting *Oster*, 582 So. 2d at 1289).

This analysis has been adopted by nearly every jurisdiction in the United States, including Mississippi, which had long held onto the "open and obvious danger" defense[18]: *Union Supply Co. v. Pust*, 583 P.2d 276, 284 (Colo. 1978)[19]; *See also* Theresa Ludwig Kruk, Annotation, *Products Liability: Modern Status of Rule That There Is No Liability for Patent or Obvious Dangers*, 35 A.L.R.4th 861 (1987 & Supp. 1993); Aaron D. Twerski, *From Risk-*

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[18] See Footnote 11.

[19] There, the *en banc* court rejected the open and obvious defense, noting that "[t]he apparent origin of the open-and-obvious rule was in the case of *Campo v. Scofield*, 95 N.E.2d 802 (N.Y. 1950), which has been recently overruled in *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976) From its inception, it has been frequently attacked by courts and legal scholars."

Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation, 11 Hofstra L. Rev. 861, 933 (1983). While advocating more "screening" or dismissals of product claims, Professor Twerski concedes that"[i]f the warning case gets beyond the judge and into the hands of the jury, it is difficult to sustain the contention that on risk-utility grounds, the warning need not have been given." Finally, see W.K. Viscusi, *Wading Through the Muddle of Risk-Utility Analysis,* 39 Am. U. L. Rev. 573, 580-84, 601-605 (1990).

Interestingly enough, the Fifth Circuit observed in this case that "[a]lthough the tension between Louisiana's new, pure comparative fault system and the 'obvious danger rule' *is clear,* to date, no Louisiana court has directly addressed the issue." *Kelley,* 992 F.2d at 1415 n.11. This is not correct. *Putman* does address the issue, applying the risk-utility analysis to determine the contours of any duty to warn case. Louisiana simply does not recognize the "open and obvious danger" rule as a bar. Rather, Louisiana applies a comparative negligence analysis.[20]

The Colorado Supreme Court addressed this very issue head-on in *Camacho v. Honda Motor Co.,* 741 P.2d 1240 (Colo. 1987), *cert. dismissed,* 485 U.S. 901 (1988). The plaintiff in *Camacho* sued Honda alleging that the motorcycle he purchased was unsafe and defective because it was not equipped with "crash bars" *and* because "the failure to provide adequate warnings rendered the Honda Hawk motorcycle unreasonably dangerous." *Id.* at 1248. The

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[20] Here, the lethality of the auger was such that we moved the Court to strike defenses based on "victim fault". The Court granted the motion pursuant to *Bell v. Jet Wheel Blast, supra.* Somehow, this ruling has been lost in the shuffle. (Supplemental Appendix, "L" and "M")

lower court had granted Honda summary judgment on both theories, in part because of the obvious danger to one's legs from riding a motorcycle. The Colorado Supreme Court rejected this open-and-obvious defense, holding that the duty to warn must be subjected to a risk-utility analysis: "As this court has previously ruled, a duty to warn may exist where the danger is patent *if such warning might reduce the risk of harm* attendant upon use of the product. . . . We conclude that the efficacy of providing a warning is an appropriate issue for further inquiry by the trial court on remand." *Id.* at 1248 & n.9 (citing *Union Supply Co. v. Pust,* 583 P.2d 276) The *Camacho* analysis parallels that of the Louisiana Court of Appeals in *Putman,* which in turn relied on the rationale of the Louisiana Supreme Court in *Oster.*

The Fifth circuit admitted that the Louisiana Court of Appeals' decision in *Hopper* was the only duty-to-warn case it considered, and the Louisiana Supreme Court reversed that decision.[21] The Fifth Circuit simply misapplied Louisiana law on duty to warn. Louisiana law requires that the jury apply a risk-utility analysis to determine whether the seller had a duty to warn, and this case should be remanded for further proceedings consistent with Louisiana state law, as the Fifth Circuit itself recognized in *Satcher,* 993 F.2d at 57.

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[21] Moreover, in subsequent proceedings the Louisiana Court of Appeals reversed the trial court's entry of summary judgment in favor of the seller of the product, whom plaintiff had sued on a duty-to-warn theory. Plainly the open-and-obvious-danger rule did not apply. *Hooper v. Crown,* 560 So. 2d 890, 891-92 (La. Ct. App. 1990).

QUESTION NUMBER 3

IS THE FIFTH CIRCUIT DECISION IN THE CASE AT BAR INCONSISTENT WITH PRIOR DECISIONS OF NOT ONLY THE FIFTH, BUT OTHER CIRCUTS, WHICH HAVE ESTABLISHED A RULE AGAINST (a) GRANTING SUMMARY JUDGMENT IN PRODUCTS LIABILITY CASES AND (b) GRANTING SUMMARY JUDGMENT WHERE THE ISSUE OF "STATE OF MIND" IS A KEY ELEMENT OF THE DEFENSE ALLEGED?

The Fifth Circuit Court of Appeals correctly stated that the question of the danger presented by the auger was primarily a question of fact under Louisiana law. *Kelley*, 992 F.2d at 1418. Yet it decided that summary judgment was appropriate despite conflicting evidence on the obviousness of the danger. The Court of Appeals made the improper determination that no reasonable jury could possibly find in favor of plaintiff, notwithstanding the teaching in *Anderson* that it should not weigh conflicting evidence to do so. Here, substantial evidence made the extent of the danger from the auger *not* "open and obvious" to Jack Kelley.[22]

Kelley was never warned nor could he realize the *extent* of this danger, as hard facts in evidence reveal. Indeed, the Court took cognizance of photographs of the auger's invisibility when submerged in the ice, yet disregarded the factual issue created by the photograph. Moreover, the Court quoted witnesses who saw the machine grab and

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[22] Actually, it wasn't "open and obvious" to any of the workers who entered the bin. Fillimich sent his son to shovel ice!

"eat" a metal shovel *as if that meant that Kelley was aware:*

> " 'We had seen what it would do that day. I believe David Easley was holding a shovel, and [the auger] pulled it out of his hand, and, you know, *it was a revelation for us.*' "

Kelley, at 1416, quoting Delton Demere's testimony.

While the court conceded that Demere only realized the danger once *he* "...had seen what it could do..." *id.* at 1417, the Court ignored the fact that the employees *habitually* went into the machine to break up ice, *id.* at 1410, and that they " 'figured' it 'was part of [their] job' " to do so, *id.* at 1417. The Court's ultimate conclusion that "the question of whether the danger presented by the auger-equipped bin was obvious — that is, whether it presented a danger that should have been known to Jack Kelley under the circumstances *is also primarily a question of fact,*" *id.* at 1418, should have precluded summary judgment!

The "Rarely Appropriate" Rule. The decision in the case at bar is inconsistent with various decisions in the Fifth Circuit which have established a rule against the granting of a summary judgment in products liability cases, to the effect that:

> "The use of Summary Judgment is rarely appropriate in negligence or products liability cases, even where material facts are not disputed..."

Davidson v. Stanadyne, Inc., 718 F.2d 1334, 1338 (5th Cir.

1983); *Trevino v. Yamaha Motor Corp., U.S.A.*, 882 F.2d 182, 184 (5th Cir. 1989); *Miller-Schmidt v. Gastech, Inc.*, 864 F.2d 1181, 1185 (5th Cir. 1989); *Lavespere v. Niagara Machine & Tools Works*, 910 F.2d 167 (5th Cir.1990); *Little v. Liquid Air, supra*[23] See also, 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2729.

The rule that summary judgment is "rarely appropriate" in products liability cases has also been adopted by at least the 6th, 7th and 8th circuits. *Hughes v. America Jawa, Inc.*, 529 F.2d 21, at 23 (8th Cir. 1976); *Trotter v. Anderson*, 417 F.2d 1191 (7th Cir. 1969); *Rogers v. Peabody*, 342 F.2d 749 (6th cir. 1965); and *Daughenbaugh v. Bethlehem Steel*, 891 F.2d 1199, at 1205 (8th Cir. 1989).

The "State of Mind" Rule. Summary judgments where the "state of mind" of a party is an issue are also inappropriate. Although the majority in *Anderson* rejected a "state of mind" argument in that libel case, it seems to have done so because the respondent, relying on *Poller v. CBS*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 485 (1962) argued that a jury could simply disbelieve testimony given. Here, proof of Kelley's "state of mind" or proof of his awareness of the alleged danger was an essential element of a defense. Such a positive conclusion — that "...on the morning of July 5, 1987, when Jack Kelley climbed into the small service door on the ice bin, *he knew what was inside*", *Id* at 1417, is simply insusceptible of summary judgment determination.

This was the clear holding of Judge Wisdom in

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[23] *En banc* rehearing was ordered January 28, 1982, and the matter was argued in May of 1982. No decision has been rendered on the *en banc* rehearing.

Crowley v. Matson Navigation, 434 F.2d 72, at 73 (5th Cir.1970), which remains properly undisturbed. There, summary judgment was granted on the grounds that the plaintiff should have been fully aware of the danger inherent in working on a "dead ship" which gave off explosive vapors. The motion was based on the premise that "...there is no duty of the owner to warn the employees of the contractor if they are already fully aware of the danger..." at 75. In deciding that "knowledge" of danger was not susceptible of summary disposition, the Court held, at 77;

> "Knowledge on the part of the company can be proved only by showing the state of mind of its employees. *The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.*"

Even in whatever jurisdictions cling to the obvious-danger rule, the seller or manufacturer has a duty to warn if the user would recognize *some* danger from the product, *but not the extent* of the danger:

> "[A] warning may be required even where the defect complained of is readily apparent *if the extent of the danger may not be fully anticipated by an ordinary user of the product.* Moreover, there may be a duty to warn of an obvious defect in a product if the defect renders the product unreasonably dangerous despite its obviousness."

American Law of Products Liability 3d § 1:70, at 76 (Timothy E. Travers managing ed., 1987) (footnotes

omitted).

Jack Kelley's state of mind was that of a worker doing his job. Because the warning signs which we have annexed as Appendix J were not utilized, Jack Kelley's mind was not alerted to the danger. Not only does the law require that the warning be given, but also that the signs be located in a manner likely to catch the user's attention. *Easton v. Chevron,* 602 So.2d 1032 (4th Cir.1992).

The Court of Appeals gravely erred in affirming summary judgment under facts from which various inferences could be drawn.

QUESTION NUMBER 4

DID THE FIFTH CIRCUIT PROPERLY GRANT SUMMARY JUDGMENT OF GROUNDS NOT RAISED BY THE MOVER'S MOTION?

Rule 2.09 of the Local Rules of the Eastern District of Louisiana provides that the mover for summary judgment state concisely those material facts as to which there is no factual dispute. This is the foundation of any motion for summary judgment. In the absence of an affirmative statement by the mover, no duty shifts to the non-mover. *Celotex, supra.* In this regard, the motion filed by Industrial had the following incomplete "Statement of Uncontested Facts" (Appendix F at A-65):

I. The accident which forms the basis of this suit occurred on July 5, 1987.

II. The accident occurred in an ice storage bin manufactured by Price-Macemon/Rochester Silo.

III. The ice storage bin was not manufactured by Industrial Refrigerated Systems, Inc. Instead, Industrial Refrigerated Systems, Inc. acted only as the retail seller of the ice storage bin.

This statement of material facts does not speak to the issues decided on appeal, and did not shift *any burden* to the non-mover. At least the following material matters were *not* raised by Industrial's 2.09 certification of uncontested material facts: (a) No statement is made that *Industrial had no knowledge of the defect.* (b) No statement is made that *the product sold was not dangerous* (c) No statement is made that *the product sold was not defective.* (d) No statement is made that *an adequate warning was given.* (e) No statement is made that *adequate steps to protect the user were taken.* **(f) No statement is made that the danger was open and obvious.**

Indeed, the motion for summary judgment was supported *solely* by the affidavit of David McGowan, who swore as follows (Appendix F at 68):

> "...IRS was never aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley."

Under these circumstances, the District Court could not even have granted an unopposed motion. Under these circumstances, the Court of Appeals could not have affirmed a summary judgment, which it must review *de novo.*

QUESTION NUMBER 5

IS THE LETHALITY OF SCREW-TYPE AUGERS A MATTER OF NATIONAL CONCERN SO AS TO WARRANT CONSIDERATION OF THIS CASE BY THE SUPREME COURT?

The lethality of screw-type augers is a matter of *national concern.* We believed that the "Jet Wheel" doctrine applied and so moved, *in limine.* The District Court granted our motion but did not actually exclude evidence of "victim fault". The Fifth Circuit did not deal with the issue because it affirmed summary judgment. We believe that the application of the "Jet Wheel" doctrine to machinery as lethal as the auger involved herein is a matter of exceptional *societal* importance. As we have previously stated in this application, agriculture is "*...the most dangerous occupation in the United States...*"[24] In his papers to the American Society of Agricultural Engineers, J.B. Sevart has *criticized* the industry argument that safety would be best insured by (a) providing warnings and (b) instructing operators to turn the machine OFF when leaving the operator position. In criticizing this utopian concept, Mr. Sevart's research paper noted that the strategy had failed miserably "...to reduce the number and severity of the injuries associated with agricultural equipment..." Regarding the foreseeability of what happened to Jack Kelley, Mr. Sevart wrote, as follows:

> "No human operator can be expected to be one hundred percent perfect. Who hasn't run a stop sign or a red light even though he had traveled the route many times and in fact, the number of times the route had been traveled may be a dominant factor in the incident. *It is most foreseeable that boredom, fatigue, worry, inexperience,*[25] *and*

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[24] The orbital bin at issue was typically used to convey grain, but had been adapted to convey ice by Rochester Silo.

[25] In the case at bar, Jack Kelley was inexperienced with the perils of the auger:

(a) He wasn't there when the auger ate the shovel;

a host of other factors deny the existence of the perfect operator."

In the remainder of his paper, Mr. Sevart suggested the use of interlocks, dead-man controls, and emergency stops, all of which were available when *this* ice plant was assembled in Lafourche Parish in 1987. Detailed references to national publications were included in our original brief to the Court of Appeals, p 21 - 26. Our suggestion for *en banc* rehearing raised issues regarding the *societal* importance of the issues raised. (Supplemental Appendix N)

An unfortunate by-product of decisions such as this are that manufacturers and sellers will not have an incentive to make products safer. Rather, a manufacturer or seller stands to be rewarded by removing guards so as to "reveal" the dangers inherent in machninery.

Such a trend is dangerous indeed and this Court's role in rendering decisions which have *societal* impact would be furthered by granting certiorari.

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footnote 25 continued.

(b) when he worked inside the bin, the ice masked the danger (Appendix D). *See also,* Plaintiff's Exhibit "J"; and

(c) when he was killed, it was, *at best,* Jack Kelley's second time inside the bin.

CONCLUSION

The Fifth Circuit Court of Appeals, relying on *rejected law,* departed from accepted standards, misunderstood the requirement imposed upon a mover for summary judgment, disregarded the admonitions of this Court in *CATRETT-ANDERSON-MATSUSHITA* and granted summary judgment on grounds which other panels of the Fifth Circuit and other Circuits have declared "inappropriate".

Typically, litigants are too discouraged to seek redress by way of certiorari. The likelihood of success is marginal, the expense is high and the effort is substantial. Thus, many decisions by the Courts of Appeal go unchallenged, creating an impression of invincibility on the part of any given panel.

With all due respect, the decision below ought not go unchecked. Certiorari is warranted on the merits of the application, and should be granted to reverse a dangerous trend, characteristic of the Fifth Circuit, toward "trial by affidavit."

Certiorari should also be granted to review the validity of the "open and obvious danger" defense, which runs *against any national goal promoting safety.*

Respectfully submitted:

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

OF COUNSEL:

HEISLER & WYSOCKI